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No. 90-1025

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN A. MMAHAT AND MMAHAT & DUFFY, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts correctly concluded that petitioners had failed to introduce sufficient evidence relating to the proportionate fault of the defendants that settled to warrant submission of the relative negligence of the settling co-defendants to the jury.

2. Whether the district court abused its discretion by refusing to include a specific interrogatory on proximate cause in the special verdict form submitted to the jury.

3. Whether the district court properly exercised its discretion by admitting Federal Home Loan Bank Board examination reports into evidence as "public records" under Federal Rule of Evidence 803(8).

4. Whether the lower courts correctly concluded that the judgment against petitioner John Mmahat is not dischargeable in bankruptcy pursuant to 11 U.S.C. 523(a)(4) because it is a debt for defalcation while acting in a fiduciary capacity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 59-86) is reported at 907 F.2d 546. The relevant opinion of the district court (Pet. App. 50-58) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1990. A petition for rehearing was denied on September 24, 1990. Pet. App. 87-88. The petition for a writ of certiorari was filed on December 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Gulf Federal Savings Bank was a federally insured thrift. Petitioner John Mmahat, general counsel for Gulf Federal, and his law firm, Mmahat & Duffy, received fees for work on all loans closed by Gulf Federal equal to a percentage of the principal amount of the loan. At the time Gulf Federal commenced its commercial lending program, the Federal Home Loan Bank Board (FHLBB) restricted the amount that a federally insured thrift could lend to any one borrower. 12 C.F.R. 563.9-3 (the "loans to one borrower" or "LTOB" regulation). Despite the regulation, "Mmahat specifically instructed the board of directors 'never [to] turn a loan down because it is over our loans to one customer limit.'" Pet. App. 61. The district court found that "Mmahat's violations of his fiduciary responsibility to Gulf with respect to the loans to one borrower regulation * * * were motivated by Mmahat's desire to continue his control over Gulf and the enormous fees which he and his law firm were able to reap as a result of his defalcation." *Id.* at 55. The court of appeals affirmed the judgment that petitioners are liable for Gulf Federal's losses resulting from loans that violated the LTOB regulation and the district court's holding that the judgment is not dischargeable in bankruptcy.

1. In November 1986, the FHLBB declared Gulf Federal insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. Upon its appointment, FSLIC acquired certain assets of the failed institution, including claims against the institution's officers, directors, and attorneys. As receiver, FSLIC subsequently transferred certain of its claims, including those at issue here, to FSLIC in its corporate capacity.[1] FSLIC then filed

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[1] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role pursuant to changes resulting from the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989

this action to recover damages incurred by Gulf Federal as a result of wrongful actions taken by Gulf Federal's directors, officers, and lawyers.

FSLIC alleged that John Mmahat was liable to FSLIC for legal malpractice for advising Gulf Federal to ignore the federal lending limits in the LTOB regulation. It also alleged that Mmahat & Duffy was vicariously liable to FSLIC for John Mmahat's malpractice.

Shortly after FSLIC filed its complaint, John Mmahat filed for bankruptcy. FSLIC filed a proof of claim in the bankruptcy proceeding and a petition to determine the dischargeability of its claims. Pet. App. 53. Subsequently, FSLIC's petition to determine dischargeability was consolidated with its main action against Mmahat in the district court. *Id.* at 54.

2. After the trial started, FSLIC settled its claims against the former officers and directors for approximately $1.9 million. Under Louisiana law, a non-settling party may seek to reduce any judgment entered against him by proving the proportionate share of liability of any settling party. See La. Civ. Code Ann. arts. 1803 and 1804 (West 1990). At the end of the trial, Mmahat accordingly requested the district court to instruct the jury to determine, with respect to each of the seven loan transactions at issue, the proportionate degree of fault (expressed as a percentage) of each of the former officers and directors. The district court denied that request on the ground that there was insufficient evidence to permit a jury finding on that issue. Pet. App. 67.

In response to special interrogatories, the jury returned a verdict in favor of FSLIC and against John Mmahat and Mmahat & Duffy. It found that they had committed legal

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(FIRREA), Pub. L. No. 101-73, 401(a), (f), and (h), 103 Stat. 354, 356, 357. Accordingly, the FDIC is the respondent in this action.

malpractice and had breached their fiduciary duties as counsel to Gulf Federal. The jury awarded FSLIC damages of $35 million, which represented Gulf Federal's losses on the seven loan transactions.

After the district court entered judgment based upon the verdict, it took certain issues under submission, among which was whether the jury's award to FSLIC was dischargeable in the bankruptcy proceeding filed by Mmahat. The district court subsequently issued an order finding that the award was not dischargeable. Pet. App. 50-58. The court stated, based upon the jury's findings that Mmahat repeatedly had breached his fiduciary duties to Gulf Federal, that Mmahat's wrongful conduct fell with 11 U.S.C. 523(a)(4), which exempts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity." Pet. App. 56. In reaching that conclusion, the court stated that "[i]t is patently clear from the record that the jury's findings were correct." *Id.* at 54-55.

3. The court of appeals affirmed. Pet. App. 59-86. First, the court found that the district court correctly determined not to submit to the jury an interrogatory on the proportion of fault attributable to the settling co-defendants. The court of appeals agreed with the district court that "Mmahat had the burden at trial of proving the settlors' share of fault," but he failed to submit sufficient evidence "to permit a finding of proportionate fault." *Id.* at 67. The court also found, however, that the money paid by the settling defendants and the recovery from Mmahat overlapped, and so remanded the case to the district court with instructions that it provide Mmahat with a dollar-for-dollar credit for the amount paid by the settling defendants that was attributable to the seven loan transactions sued upon by FSLIC. *Id.* at 68.

The court further found that the district court had given "full and complete" instructions to the jury on the issue of

proximate cause. Pet. App. 78. With respect to petitioners' claim that the proximate cause issue should have been presented in the special interrogatories as well as the jury instructions, the court of appeals stated that it would "defer to the district court's broad discretion." *Ibid.*

The court of appeals also rejected petitioners' contention that the district court erred in admitting into evidence certain examination reports of Gulf Federal that were prepared by the Federal Home Loan Bank Board. The court concluded that the reports themselves were public records. It also found that the contents of the reports—including statements of John Mmahat's brother, who was also a defendant in the lawsuit, opining that "Mmahat encouraged improper loans so his law firm could make fees"—were admissible under the admission exception to the hearsay rule. Pet. App. 72-73.

The court of appeals also affirmed the district court's determination that the judgment against Mmahat was not dischargeable in bankruptcy under 11 U.S.C. 523(a)(4). The court explained that "there was defalcation" because "Mmahat urged Gulf Federal to make improper loans so that he could earn fees," and "thereby enriched himself at the cost of Gulf Federal's asssets." Pet. App. 69.[2]

ARGUMENT

Petitioners contend that the court of appeals erred by affirming the district court's decisions: (1) not to submit the

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[2] Based upon the jury's findings, the district court held that Mmahat's actions fell within the dishonesty exclusion in his insurance policy. Pet. App. 63. The FDIC appealed this finding, but the court of appeals affirmed, explaining that Mmahat had not merely committed malpractice by giving improper advice, but had breached his fiduciary duties by committing malpractice in order to generate fees. *Id.* at 82. The FDIC is not cross-petitioning with respect to the holding that Mmahat's insurance carrier is not liable.

proportionate fault question to the jury; (2) not to include the proximate cause issue on the special verdict form; (3) not to suppress the examination reports prepared by the Federal Home Loan Bank Board; and (4) not to discharge the judgment against Mmahat. Contrary to petitioners' contentions, the district court applied settled principles of law in deciding those issues, and its decisions do not conflict with any decision of this Court or any other court of appeals. The court of appeals' rejection of petitioners' fact-bound contentions raises no issue worthy of this Court's review.

1. Petitioners assert (Pet. 17-18) that the district court's determination not to submit to the jury the question of the degree of negligence of the settling co-defendants is in conflict with decisions of the Louisiana Supreme Court. As an initial matter, conflicts between state courts and the federal courts of appeal on questions of state law do not warrant resolution by this Court. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). In any event, the decision in this case is consistent with Louisiana law. Under Louisiana law, non-settling defendants bear the burden of proving the liability of settling parties if they seek to have the plaintiff's recovery against them reduced by the proportionate share of liability of the settling defendants. *Raley* v. *Carter*, 412 So. 2d 1045, 1047 (La. 1982). The district court in this case simply held that petitioners had failed to meet their burden of submitting sufficient evidence to permit findings on proportionate fault, and the court of appeals agreed. Pet. App. 67. The district court therefore correctly refused to give the jury instruction requested by petitioners, which otherwise would have been appropriate under Louisiana law. This question of the sufficiency of the evidence does not warrant review by this Court.[3]

[3] On appeal, the FDIC urged the court to adopt, as a matter of federal common law, a rule that would reduce the regulators' judgments dollar-

2. Petitioners contend (Pet. 24) that because the district court did not include the proximate cause issue on the special verdict form submitted to the jury, "[t]he FDIC was exempted from the essential element of proximate cause in this tort case." There is no basis for that assertion. The FDIC presented evidence on causation and the district court both instructed the jury that the FDIC must prove proximate cause and explained the elements of proximate cause to the jury. Pet. App. 78. The special verdict form, when read as a whole in conjunction with the district court's charge to the jury, fairly presented all of the material issues in the case. See *Klein* v. *Sears, Roebuck & Co.*, 773 F.2d 1421, 1426-1427 (4th Cir. 1985) (failure to include *interrogatory* on the element of proximate cause was not reversible error where the *instructions* were sufficient to apprise the jury of the need for a finding that the damages were proximately caused by the tortious conduct).

It is settled that a trial court "has considerable discretion about the nature and scope of the issues to be submitted to the jury under Rule 49(a) so long as they present the case fairly." 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2506, at 498 (1971).[4] The court of appeals correctly

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for-dollar by the amount of the settlement. The court of appeals concluded that petitioners' failure to introduce sufficient evidence as to the proportionate fault of the settlors made it unnecessary to decide the federal common law issue advanced by the FDIC. Pet. App. 67.

Petitioners, who urged application of Louisiana law in both the district court and court of appeals, now argue that this Court should adopt a uniform federal common law *proportional* offset rule. Pet. 23. In view of the conclusion of both the district court and the court of appeals that the evidence was insufficient to permit a finding as to the proportionate fault of the settlors, this Court should decline petitioners' invitation to address whether federal common law or Louisiana law applies.

[4] See, *e.g.*, *Structural Rubber Prods.* v. *Park Rubber*, 749 F.2d 707, 720 (Fed. Cir. 1984); *Cutlass Productions, Inc.* v. *Bregman*, 682 F.2d

concluded that the district court in this case properly instructed the jury and that there was sufficient evidence to sustain the jury's verdict. Pet. 76-77. Those rulings do not warrant this Court's attention.

3. Petitioners contend (Pet. 31) that this Court should review the district court's ruling admitting into evidence portions of certain Federal Home Loan Bank Board examination reports in order to "clarify [the] decision in *Beech Aircraft Corp.* v. *Rainey*," 488 U.S. 153 (1988), and "to instruct federal courts on what constitutes trustworthiness" under Fed. R. Evid. 803(8). No such clarification is needed.

The court of appeals correctly concluded that the reports were admissible as public records. See Pet. 72-73; Fed. R. Evid. 803(8); *Farmers & Merchants Nat. Bank* v. *Bryan*, 902 F.2d 1520, 1523-1524 (10th Cir. 1990) (examination reports prepared by the Office of the Comptroller of the Currency held admissible under Rule 803(8) in a suit against former officers and directors of the bank for violation of federal lending limits). Such reports are inadmissible under Rule 803(8) only if "the sources of information or other circumstances indicate lack of trustworthiness," and petitioners bear the burden of persuasion on that issue. See *Kehm* v. *Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. 1981). Petitioners failed to meet that burden and they point to no evidence in the record to support their contention that the FHLBB reports were untrustworthy.

323, 327 (2d Cir. 1982); *Klein* v. *Sears, Roebuck & Co.*, 773 F.2d at 1426-1427; *Holt Oil & Gas Corp.* v. *Harvey*, 801 F.2d 773, 782 (5th Cir. 1986), cert. denied, 481 U.S. 1015 (1987); *National Bank of Commerce* v. *Royal Exchange Assurance of America*, 455 F.2d 892, 898 (6th Cir. 1972); *In re Hawaii Fed. Asbestos Cases*, 871 F.2d 891, 894 (9th Cir. 1989); *Litman* v. *Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984), cert. denied, 481 U.S. 1006 (1988).

Instead, they merely urge this Court to "articulate guidelines" concerning "trustworthiness" in addition to the factors identified by the Advisory Committee on the Rules, which were noted by this Court in *Rainey*, 488 U.S. at 167 n.11. Particularly since there is no discernible conflict among the lower federal courts on the "trustworthiness" issue,[5] further review of this issue is not warranted.

4. Petitioner John Mmahat alleges (Pet. 43) that the holding that the judgment entered against him is exempt from discharge in bankruptcy under 11 U.S.C. 523(a)(4) as a debt for fraud or defalcation while acting in a fiduciary capacity conflicts with decisions of this Court and a prior Fifth Circuit decision. Petitioner states without further explanation or argument that the decision conflicts with *Upshur* v. *Briscoe*, 138 U.S. 365 (1891); *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934); and *In re Angelle*, 610 F.2d 1335 (5th Cir. 1980).

None of these cases conflicts with the Fifth Circuit's decision in this case. The cases hold that to be non-dischargeable (1) the relationship between the bankrupt and the creditor must be more than "the usual one of contract between debtor and creditor" (*Upshur*, 138 U.S. at 375; see *Davis*, 293 U.S. at 333; *Angelle*, 610 F.2d at 1338)), and (2) the fiduciary relationship "must exist prior to the act creating the debt and without reference to that act" (*Angelle*, 610 F.2d at 1338; see *Davis*, 293 U.S. at 333; *Upshur*, 138 U.S. at 377-378). Those requirements were satisfied here. First, the lower courts correctly concluded that the attorney-client relationship is fiduciary in nature under Louisiana law. *Plaquemines Parish Comm'n Council* v. *Delta Dev. Co.*, 502

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[5] Petitioners allege that there is a conflict (Pet. 39), but cite no case in support of that claim.

So. 2d 1034, 1040 (La. 1987); *Boisdore* v. *Bridgeman*, 502 So. 2d 1149, 1154 (La. App. 1987). Second, the record establishes—and petitioner does not contend otherwise—that this fiduciary relationship preexisted the seven loan transactions that formed the basis of the judgment against him.

Mmahat also apparently contends (Pet. 43), citing *In re Boyle*, 819 F.2d 583, 587 n.9 (5th Cir. 1987), that the judgment against him is not a debt for defalcation because he did not misuse the monies of a "trust fund." But in *Boyle* the court held that 11 U.S.C. 523(a)(4) "was intended to reach those debts incurred through abuse of fiduciary positions." 819 F.2d at 588. That accurately describes this case, where the district court concluded that Mmahat breached his fiduciary duties in order to generate "the enormous fees which he and his law firm were able to reap as a result of his defalcation." Pet. App. 55.[6]

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[6] In any event, the conflicts alleged between the decision in this case and other Fifth Circuit cases do not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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